

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

3 Fair Isaac Corporation,) File No. 16-cv-1054 (DTS)
4 a Delaware Corporation,)
5 Plaintiff,)
6 v.)
7 Federal Insurance Company,) Audio Conference
8 an Indiana corporation,) Minneapolis, Minnesota
9 and ACE American Insurance) Tuesday, February 14, 2023
Company, a Pennsylvania) 5:04 p.m.
Corporation,)
10 Defendants.)

BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(STATUS CONFERENCE)

23 Proceedings recorded by mechanical stenography;
transcript produced by computer.

* * *

1 APPEARANCES:

2 For Plaintiff:

MERCHANT & GOULD P.C.
BY: ALLEN W. HINDERAKER
HEATHER J. KLIEBENSTEIN
PAIGE S. STRADLEY
MICHAEL A. ERBELE
150 South Fifth Street, #2200
Minneapolis, Minnesota 55402

6 For Defendants:

FREDRIKSON & BYRON
BY: TERRENCE J. FLEMING
LEAH C. JANUS
RYAN C. YOUNG
200 South Sixth Street, #4000
Minneapolis, Minnesota 55402

9 O'MELVENY & MYERS LLP

BY: LEAH GODESKY
ROXANA GUIDERO
Times Square Tower
7 Times Square
New York, New York 10036

13 Court Reporter:

RENEE A. ROGGE, RMR-CRR
United States District Courthouse
300 South Fourth Street, Box 1005
Minneapolis, Minnesota 55415

16 * * *

1 **P R O C E E D I N G S**2 **IN OPEN COURT VIA AUDIO TELEPHONIC CONFERENCE**

3 THE COURT: So we are on the record in the matter
4 of Fair Isaac Corporation versus Federal Insurance Company,
5 et al., Civil Number 16-1054.

6 The court will ask Mr. Hinderaker to again note
7 the appearances of everybody on behalf of FICO and then
8 Ms. Godesky on behalf of Federal.

9 Go ahead, Mr. Hinderaker.

10 MR. HINDERAKER: Allen Hinderaker on behalf of
11 FICO, along with Heather Kliebenstein, Michael Erbele and
12 Paige Stradley, all from Merchant Gould, and James Woodward
13 from -- vice president/deputy general counsel of FICO.

14 THE COURT: All right. And counsel for Federal,
15 if you will note your appearances.

16 MS. GODESKY: Sure, Your Honor. This is Leah
17 Godesky. And I'm joined by Leah Janus, Terry Fleming,
18 Roxana Guidero and Ryan Young, and Max Bryer from Chubb is
19 also with us.

20 THE COURT: All right. Thank you.

21 All right. Just giving you guys all a sense of
22 how best to do this, since we're on the phone, you know, one
23 of the things that happens is inevitably if I have a
24 question or I interrupt you, we will have a period where you
25 may not hear me and we will be talking over each other. Be

1 patient. It happens. The court reporter will figure it
2 out.

3 But I'll give each side ten minutes on each of the
4 two subjects. So that's 40 minutes right there. But then
5 we'll get done with this by 6:00, I believe.

6 So the first issue I would like to take up is the
7 question about the witnesses who will testify regarding the
8 use of Blaze Advisor by Federal's affiliates in Canada,
9 Europe and Australia. And I believe, I believe FICO raised
10 the issue. It doesn't much matter who goes first, but I'm
11 going to have the proponent of the, quote, "offending
12 evidence," if you will, go first in each of these two
13 matters.

14 So, Ms. Godesky, you first on the evidence you are
15 planning to admit or talk about in opening statement and why
16 it's felt as admissible.

17 MS. GODESKY: Yes, Your Honor. Thank you. This
18 is Leah Godesky. Ms. Janus is actually going to handle this
19 one.

20 THE COURT: Okay. Thank you.

21 MS. JANUS: Hello, Your Honor.

22 THE COURT: Ms. Janus.

23 MS. JANUS: Thank you. This is Ms. Janus.

24 So the defendants intend to present witness
25 testimony from Schreiber and Wachs and documents relating to

1 the defendants' use of Blaze outside of the United States,
2 FICO's knowledge of that use of Blaze, and FICO's
3 interpretation of the license agreements during the pendency
4 of the license agreements that was acknowledging the right
5 of Federal to use Blaze outside of the United States.

6 THE COURT: Let me interrupt you for one second.

7 MS. JANUS: Sure.

8 THE COURT: Are the entities that used the
9 license, are they in fact distinct companies that are
10 properly described as Federal affiliates?

11 MS. JANUS: Yes. They are, yes, they are Federal
12 affiliates.

13 THE COURT: Okay. Keep going.

14 MS. JANUS: So that is evidence that has been at
15 issue in the case throughout the pendency of the case, and
16 it remains an issue in the case.

17 The court need look no further than the second
18 paragraph of the introduction of FICO's trial brief to see
19 that FICO is continuing to assert a claim under the license
20 agreement based on the definition of "client and its
21 affiliates" in the license agreement.

22 And on page 1 of this trial brief, it makes clear
23 that the restriction on the definition of "client" was
24 breached before termination, quote, "because three foreign
25 insurance companies and two third party consultants were

1 permitted access to and use of Blaze Advisor." So squarely
2 at issue in this case is the fact that FICO asserts it was a
3 breach of the license agreement for three foreign affiliates
4 of Federal to use Blaze.

5 Federal and the defendants --

6 THE COURT: Is -- hang on a second.

7 MS. JANUS: Go ahead.

8 THE COURT: Sorry. Was the -- I grant you the
9 current status of the argument, but at the time was the
10 allegation regarding these three affiliates that there
11 was -- it was a breach to allow them to use it strictly
12 because there was a territorial limit in the license
13 agreement or because they were a Federal affiliate and not a
14 Chubb affiliate or both?

15 MS. JANUS: Well, you're talking about FICO's
16 allegations?

17 THE COURT: Yes.

18 MS. JANUS: I believe they would take the position
19 it's been both throughout the case. And so they would take
20 the position that 3.1 was violated based on the foreign
21 company use, and they have several theories of getting at
22 that. One was a territory theory, one is a client and
23 affiliates theory, but either way the issue is, Are these
24 foreign affiliates of Federal allowed to use Blaze prior,
25 you know, prior to the termination. That is the issue on

1 this breach claim.

2 And regardless of how they frame it, Federal and
3 the defendants collectively are absolutely entitled to
4 counteract that argument and whatever evidence they're going
5 to, they're going to present to maintain that argument with,
6 frankly, you know, very, very clear document and testimonial
7 evidence that FICO knew all along that these Federal
8 affiliates were using Blaze, allowed the Federal affiliates
9 to use Blaze, marketed to the Federal affiliates for upsells
10 and internally discussed the fact that the license allowed
11 the Federal affiliates to use Blaze.

12 So the idea that somehow the defendants shouldn't
13 be able to present that evidence in response to a direct
14 breach argument about the Federal affiliates using Blaze is,
15 is really just contrary to the law.

16 THE COURT: Okay. Anything further, Ms. Janus?

17 MS. JANUS: Well, we mentioned in our letter, Your
18 Honor, that the evidence is also relevant to the defendants'
19 counterclaims.

20 In the period of time of negotiation prior to the
21 purported termination, FICO took the position that it had
22 just learned of Federal's affiliates foreign use of Blaze
23 and that, you know, that was a breach of the agreement and
24 FICO attempted to extract additional license fees. And then
25 Federal -- or I'm sorry -- FICO purported to terminate the

1 license, based in part on the Federal affiliates' foreign
2 use. So the fact that FICO took those positions in an
3 effort to extract additional license fees in the face of
4 FICO's own knowledge of foreign use and consent to foreign
5 use is relevant to the counterclaims.

6 I want to be really clear, though, that it's
7 really -- FICO's letter attempts to sort of shoehorn our use
8 of the evidence solely into a counterclaim about litigation
9 strategy, and that is not the only use of the evidence.
10 This issue was not before the court at the pretrial
11 conference. What was before the court, as the court knows,
12 is the summary judgment order and the complaint. So while
13 we absolutely believe it's relevant to the counterclaims,
14 the fact of the matter is it's directly relevant to FICO's
15 breach claim as well.

16 THE COURT: Okay. One last chance, Ms. Janus.
17 You have one minute left. Or have you said your peace?

18 MS. JANUS: I've said my peace, Your Honor. Thank
19 you.

20 THE COURT: Okay. Thank you.

21 Mr. Hinderaker, you or whoever on your team have
22 the floor.

23 MR. HINDERAKER: There's a few issues going on
24 here. Let me start with, let me start with the geographical
25 limitation.

1 You've already got -- you've already provided your
2 guidance that the issue of any geographical limitation of
3 the license agreement is not in this case. You've given
4 your guidance that we will not be litigating the litigation
5 and, consequently, that should not be in the case.

6 The last paragraph of the defendants' letter
7 saying that this evidence that they now -- be used is
8 relevant to defendants' counterclaims, quote, "Based in part
9 on the use of Blaze Advisor by Federal's affiliates outside
10 of the United States," that is the geographical limitation
11 issue that is irrelevant simply recast.

12 Now, so we seek some clear guidance with respect
13 to that. And you know our memorandum on Motion in Limine 6
14 and our recent letter with respect to the prejudice to FICO
15 from defending these new theories, relative to the
16 counterclaim, that were not raised until in one instance
17 15 days ago and now in the second one perhaps just this
18 afternoon.

19 But let me now turn to, to this issue that is
20 argument of "client and its affiliates." And a review of
21 the summary judgment order will test whether I'm being
22 accurate or not. And a review of the references that are in
23 Ms. Godesky's letter, I think the fact that 445, 17 through
24 19 and 20 through 21, and Docket 507 at 14, I think, with
25 all respect, belie the arguments that were just made.

1 In the defendants' arguments and the defendants'
2 briefing, everything is centered around whether the license
3 agreement was limited to use inside the United States or
4 whether it could be used outside of the United States and
5 was global in nature. And it was the geographical
6 limitation that Judge Wright resolved.

7 And now let me turn to the issue of "client and
8 its affiliates," because that had nothing ever before to do
9 with any geographical limitation.

10 FICO has always agreed, it has never been in
11 dispute, that the three foreign insurance companies are
12 affiliates of Federal. Not an issue.

13 If there was a geographical limitation to the
14 United States, as the license agreement had in its
15 definitions, then the use, the use by those foreign
16 insurance companies was improper because of the geographical
17 limitation.

18 If there was no geographical limitation and it
19 could be used internationally, that presents a different
20 issue and that presents the issue of who is the client,
21 because as Amendment Two says it is the client and its
22 affiliates that have permission to use Blaze Advisor. And
23 if there is no geographical limitation, that permission is
24 international, but it is a permission given to the client
25 and the client's affiliates. And the client is Chubb & Son,

1 and Chubb & Son has no affiliates.

2 So, and at the summary judgment stage the focus of
3 the defendants was, Well, "client" must mean Federal, not
4 because there was any issue about the foreign insurance
5 companies being affiliates, but "client" must mean Federal
6 because of the mistaken belief that only a legal entity can
7 contract and because of a mistaken belief that the
8 enterprise-wide license wasn't an expansion of permission,
9 expansion of scope from the divisional one unless Federal
10 was the client.

11 So this argument that somehow a geographical
12 restriction relates to who the client is makes no sense to
13 me and is the first out of the box today. If Federal is not
14 the client, then it doesn't matter if there's no
15 geographical limitation because Chubb & Son has its
16 employees in the United States.

17 So the notion that the geographical limitation has
18 ever had anything to do with the meaning of "client and its
19 affiliates," a review of the summary judgment decision, a
20 review of the parties' briefing, a review of the particular
21 parts of the parties' briefing that are referenced in
22 Ms. Godesky's letter belie the argument.

23 The impact here as well is they want to make this
24 contention that FICO was extracting additional fees under
25 some international argument. The evidence is that during

1 the negotiations FICO offered a new license with U.S. scope,
2 a new license with an international scope and a hybrid
3 license with some, you know, some -- with not a full
4 international -- I mean, Blaze -- FICO offered Chubb & Son
5 all of the options that might fit its needs. There wasn't
6 an extraction of fees. Instead, it was, If you want a U.S.
7 license, that's a smaller fee; If you want an international
8 license, that's a little bigger fee; Can we fit your needs,
9 and you decide, you tell us what those needs are.

10 And to segue slightly into the next argument, the
11 notion now is, by the defendants, Well, those negotiations
12 of FICO offering whatever options would fit the defendants'
13 needs for granting its consent to continued use, now those
14 offers should be precluded from the jury's consideration
15 under the 408 argument. The trial seems to be an effort of
16 precluding FICO from presenting relevant evidence to the
17 issues and also an effort to relitigate the geographical
18 restriction that's not, that's not in the case.

19 THE COURT: Okay. Thank you, Mr. Hinderaker.

20 Let's turn to -- the way we're going to do this is
21 I'm going to hear you all out on both of these, and then I'm
22 going to take a brief break, and then we'll come back and
23 I'll tell you what I'm going to do. And everybody needs to
24 stay on the line, of course.

25 On the other issue it appears that FICO is the

1 proponent of the, quote, "bad evidence," close quote. And
2 so, Mr. Hinderaker, you get the floor first on this one.

3 I do have a question for you on it out of the box,
4 which is I've looked at the exhibits that at least were
5 attached -- well, I've looked at both sets of exhibits, but
6 I've looked at the ones that were attached to Ms. Godesky's
7 letter. And so my question is, Relating to those exhibits,
8 what's the purpose for which FICO would offer them at trial?

9 MR. HINDERAKER: Yes. And for clarity, one of the
10 exhibits, P0855, the confidential settlement agreement and
11 general release, that was removed from our exhibit list a
12 few hours ago today, whether morning or early afternoon. So
13 that particular document is not at issue. FICO is not going
14 to be advancing that document as part of our --

15 THE COURT: That one is an easy one. I'm glad you
16 removed it.

17 MR. HINDERAKER: Thank you.

18 The remainder are, and as Tamra Pawloski said, the
19 licensing representative for Chubb & Son, the remainder were
20 the back-and-forth negotiations in an effort to come to
21 mutual terms on FICO's consent to the continued use of Blaze
22 Advisor in a new expanded enterprise. And as from the
23 documents referenced and as Tamra Pawloski's deposition
24 acknowledged, those negotiations at the time included
25 Chubb & Son's interest in additional FICO products, and

1 those additional possible technologies were also
2 incorporated into the discussions and into the pricing
3 options that were offered.

4 So FICO is -- and the original, the original
5 counterclaims were bad faith, covenant of -- breach of the
6 covenant. The original one was that FICO unreasonably,
7 arbitrarily refused to give its consent to the continued use
8 of Blaze Advisor by the defendants. And these negotiations
9 are all about business negotiations about FICO and the terms
10 under which it would give that consent. So they're not
11 offered for Rule 408 purpose. There are other elements of
12 those negotiations that are not objected to by the
13 defendants. So their efforts are to select out those
14 communications that they prefer not the jury to see, keeping
15 in the communications that they like.

16 And our goal is to have a fair set of
17 communications, a fair story from the notice of breach
18 letter in January to the, through the negotiations and to
19 the point where the parties were not able to reach
20 agreement, showing that, one, showing the effort to comply
21 with paragraph 10.8 and, secondly, in terms of the original
22 counterclaim of breach of covenant of good faith, of
23 presenting evidence of the parties' efforts, actually they
24 were mutual, but FICO's efforts in good faith to reach an
25 agreement and a new license for the continued use of Blaze

1 Advisor.

2 So, Your Honor, that's not a poor boy issue or
3 purpose, and, secondly, it's certainly directly relevant to
4 the contention that's been in the lawsuit from the outset
5 that FICO did not meet its covenants of good faith by not
6 granting its consent.

7 THE COURT: But let me ask you -- so if I'm
8 hearing it right -- first of all, this issue is somewhat
9 unique to this case. If I'm hearing you right, what I'm
10 hearing is that FICO wants to put -- and I'm looking at P101
11 and P263 and all the other ones, other than the one you
12 removed from your list. And FICO wants to put these in
13 front of the jury and say, The parties engaged in a process
14 of negotiation after the January 26 or 27, whatever it was,
15 notice of breach, and here's evidence of our good faith in
16 conducting those negotiations, and, therefore, it is
17 responsive to the idea that we breached the implied covenant
18 of good faith and fair dealing.

19 MR. HINDERAKER: That's true.

20 THE COURT: Fair summary? Or am I missing
21 something else then as well, right?

22 MR. HINDERAKER: Well, there's one other -- it
23 will come back into the case in another way, and we've heard
24 the arguments in recent motion practice, the arguments being
25 that here during these negotiations, if can get a new

1 license agreement, the offerings of price were ranged
2 between, I'll say, you know, approximately 2.5 million and
3 3.3, 3.4 million, depending on the option, depending on what
4 Chubb & Son wanted. And as night follows to day, we're
5 going to hear the contention that the application-based
6 pricing of FICO's standard pricing methodology, which
7 results in tens of millions of dollars of fees, is
8 inappropriate in light of what we were offering in March of
9 2016.

10 So I believe that it is appropriate for FICO to
11 have the opportunity to explain why and what in its
12 motivations in March of 2016 that resulted in numbers of
13 single-digit millions and the circumstances and the
14 motivations after the termination of the license agreement
15 seeking fees in tens of, tens of millions.

16 So having a complete picture in front of the jury
17 will come into play at that stage of the case as well, Your
18 Honor.

19 THE COURT: Okay. Understood. Anything further
20 for you, Mr. Hinderaker? You have a --

21 MR. HINDERAKER: I think I've -- I'm fine, Your
22 Honor. Thank you very much. I think I've had my ten
23 minutes.

24 THE COURT: Okay. Very well.

25 Ms. Godesky, you were -- whomever your team member

1 is who will be speaking?

2 MS. GODESKY: Thank you, Your Honor. This is Leah
3 Godesky. I will handle this one.

4 THE COURT: Let me start -- if I might.

5 MS. GODESKY: Sure.

6 THE COURT: Why these particular documents? Why
7 do you think these documents don't come into evidence?

8 MS. GODESKY: So --

9 THE COURT: To put it differently, I mean, I
10 understand your argument is they don't come in because
11 they're excluded under Rule 408. What I'm asking is really
12 what do you, for lack of a better way of putting it, what
13 are you afraid of that's going to happen when the jury sees
14 these documents?

15 MS. GODESKY: Well, I think Rule 408, Your Honor,
16 exists for a reason. Right? Settlement negotiations should
17 not be admitted because they're inherently confusing to a
18 jury.

19 If a jury sees evidence of Chubb making settlement
20 offers, that's going -- you know, lay jurors are going to
21 see that and think, Well, Chubb must have thought they owed
22 some money. That's the exact reason that Rule 408 exists,
23 and there is no exception to it here.

24 Now, there was absolutely a period of business
25 negotiations between the parties that is fair game and

1 admissible, and those are the communications that took place
2 in January 2016, around the time of that initial breach
3 letter, through February 26th. There was a response by
4 Chubb to the breach letter; FICO wrote another letter; we
5 sent another business response. All of these communications
6 were couched as, Here is our business proposal to resolve
7 the problem.

8 And if Your Honor looks at the cited testimony
9 from Ms. Pawloski in FICO's letter, it's clear that
10 Ms. Pawloski is talking about those communications. At
11 page 155 of the transcript she's testifying about a meeting
12 that happened in, quote, "early February." That's fair
13 game. That's business negotiations. We agree.

14 They also highlighted testimony from Ms. Pawloski
15 at pages 166 and 167. And if Your Honor were to look at
16 page 164, it's clear that the lead-in to that line of
17 questioning was all, What was happening between you and FICO
18 between the beginning of February and early March. So
19 Ms. Pawloski was talking about those business negotiations.
20 Those communications are on both sides' exhibit lists and
21 they can come in.

22 But when you talk about -- you know, you look at
23 these documents and it's exchanging numbers, bids, demands,
24 offers, haggling, drafts of settlement agreements. They may
25 have taken one of them off today, but P933 is still on and

1 that's a redline of a settlement agreement.

2 You know, Mr. Hinderaker suggested that this is
3 necessary evidence to defend against the bad faith claim,
4 but that's still within the heartland of Rule 408, because
5 Rule 408 says conduct and statements made during compromise
6 negotiations are not admissible on behalf of either party
7 to, quote, "disprove the validity of a disputed claim." And
8 so they want to try to disprove our breach of contract
9 counterclaim or our implied covenant counterclaim by
10 pointing to conduct during compromise negotiations, and that
11 is textbook evidence that should be precluded under
12 Rule 408.

13 And if Your Honor looks at the authorities they've
14 cited, it's clear that they are so far off base from the
15 type of relief they are asking here. The Eighth Circuit
16 case, the *Athey* case, that's an insurance bad faith claim.
17 And there was a very nuanced reason as to why the evidence
18 in that case came in, very specific to South Dakota
19 insurance law. Then they cite this Federal Circuit case
20 *MSTG*, and that case, Your Honor, only holds that Rule 408
21 does not protect settlement negotiations from discovery.
22 They have to be produced during discovery. That's all that
23 the holding says. And, of course, we agree. We produced
24 these documents. And then they cite a Florida case very,
25 very specific. It's a contract for shipbuilders, and

1 there's a dispute as to whether a contract about a sea
2 trial, like a trial run of a boat, counts as a settlement
3 negotiation. So, you know, they don't have any authority
4 for the type of relief that they are asking for.

5 And there's a real danger here. The minute you
6 start putting markups of settlement agreements -- I mean,
7 these are not arm's length parties trying to reach a
8 particular agreement. Right? There's no probative value
9 there. Everyone knows that people offer to settle for
10 reasons that might have nothing to do with their liability.
11 And jurors don't understand that.

12 And the minute we open up the parties'
13 communications after that February I would say 27th-ish
14 cut-off, we're in the heartland of Rule 408 and you can see
15 it stamped right on the parties' communications. And, you
16 know, this has been consistently something that FICO has
17 said throughout the discovery in this case, saying over and
18 over at several depositions that a lot of these
19 communications were privileged under Rule 408.

20 THE COURT: Let me interrupt you. First of all,
21 you kind of waffled just a tiny bit on this cut-off date
22 when you said February 27th-ish. What exactly is it that
23 turns what you call business negotiations into settlement
24 discussions on February 27th or thereabouts? How on a
25 principle basis am I to distinguish between those two

1 things?

2 MS. GODESKY: Yes, Your Honor. So there's -- like
3 I said, the initial breach letter comes in. In January
4 there's a response from Chubb. I know that there was then
5 some meetings like the one referenced in Ms. Pawloski's
6 testimony in February.

7 Then on February 26th Ms. Pawloski sends -- 25,
8 sorry, I was just corrected -- February 25th Ms. Pawloski
9 sent a note to the business team. She's not a lawyer.
10 Right? She's in the vendor management group at Chubb. She
11 sends a note to the business folks at FICO and she says,
12 Here's our business proposal to try to resolve this dispute,
13 and she attaches the proposal. And then there is a response
14 within about 24 hours, We've reviewed your proposal and it
15 is rejected. After that -- and I believe that "We've
16 reviewed your proposal and it is rejected" communication
17 happens on February 26th, the next day.

18 After that, there's a clear pivot to litigation.
19 Right? The proposal has been rejected. There's a specter
20 of litigation, and then the parties start trading numbers.
21 There are Rule 408 stamps on all of the communications. And
22 it's very clear at that point that you're in the heartland
23 of what Rule 408 is worried about. Right? You're putting
24 numbers on the table that jurors might view as admissions of
25 liability.

1 And so everyone agrees -- and I don't think there
2 are any objections from anyone in this case to the
3 communications between the initial breach letter and
4 February 26th. The dispute -- and I said February 27th-ish
5 because, you know, there might be one other document I don't
6 have front of mind, but it's this communication from
7 Ms. Pawloski on the 25th and the response from FICO on the
8 26th that to us is the hard line.

9 THE COURT: When you say that from that moment
10 forward, from February 26th, when FICO says it's rejected,
11 your proposal is rejected, you said there is a clear pivot
12 to litigation. How is that clear pivot to litigation
13 manifested?

14 MS. GODESKY: There's then discussions in the
15 documents, Your Honor, about how they will be terminating
16 the document and they may, you know, we're reserving all
17 rights, including the right to pursue all rights and
18 remedies in court. Right?

19 And before that, right, you have the business
20 folks making a very clear decision that they're going to try
21 first to resolve this. There's even -- you know, those
22 initial letters are sent between lawyers, but you see
23 correspondence between those lawyers agreeing, You know
24 what, we're going to have our business teams try to come up
25 with a business proposal. Right? And that's what

1 Ms. Pawloski is leading the charge on and that's what's
2 first discussed. But then -- and you can see Ms. Pawloski
3 says in her February 25th transmittal business proposal
4 there's no 408 stamp.

5 And then you can see in the communications that
6 follow in March, the ones that we attached to our letter,
7 you see a very different set of communications. You know,
8 I'm looking right now, Your Honor, at Exhibit P101.

9 Ms. Pawloski is reaching out to the folks at FICO and this
10 time, you know, she's ending her correspondence with the 408
11 rider. And that's true for all of those communications
12 throughout March.

13 THE COURT: Well, hang on, though. On
14 February 26th -- I'm looking at D302. And maybe this is
15 what you were referring to. But it says -- this is an email
16 from Carretta to Hopp saying, "Thank you for the email.
17 Proposal was not acceptable from our business and compliance
18 teams, and I confirm it is rejected."

19 MS. GODESKY: Correct.

20 THE COURT: "However, I respect the effort and
21 encourage continued aggressive business dialogue to seek a
22 resolution. In that regard, I have advised our business
23 team to meet this week and next week and confirm FICO will
24 take no action during this period to provide an opportunity
25 for the respective business teams to explore alternative

1 business resolution."

2 So that sounds like on February 26th, even though
3 the proposal was rejected, they were -- FICO was technically
4 confirming this with their business teams, they were going
5 to take the position that this is business resolution.

6 MS. GODESKY: Your Honor, as we read the
7 chronology, and I think if when you look at the
8 correspondence that then follows that's attached to our
9 motion, right, Chubb was making quite clear that this
10 posture had changed. Right? A lot of these documents have
11 portions redacted because you have lawyers involved. And
12 the Rule 408 stamp is added because it's a confidential
13 settlement proposal now instead of a business solution.

14 I mean, this is not an area of the law that I
15 don't think, you know, can be interpreted in a gray area.
16 Parties need to have confidence and security when they're
17 engaging in settlement discussions under the specter of
18 litigation that they can do so freely.

19 You can see in the email from Ms. Pawloski in
20 Exhibit P101, she's putting a table in her March 25th email
21 that lays out Chubb's willingness to pay almost a million
22 dollars to FICO. "Please note that this is a confidential
23 settlement proposal and it's protected under Rule 408."

24 There's a reason for Rule 408 exists, and it's not
25 only to protect parties at trial from jury confusion. It's

1 also, of course, the public interest in facilitating and
2 supporting settlement communications.

3 And so it's true the parties did their best to try
4 to settle this case before it resulted in litigation, and
5 they may not have done so if they thought putting money on
6 the table might mean a jury four years from now is going to
7 be told that you once thought that you had at least a
8 million dollars in liability. And so there is no authority
9 or precedent -- FICO has certainly not supported any -- for
10 overriding Rule 408 for communications, bids, demands,
11 offers, in this type of circumstance.

12 THE COURT: I don't -- so we're -- I'm going to
13 hold everybody to their ten minutes, but I have a couple of
14 questions for you.

15 I'm not disagreeing with what you are saying. The
16 problem that I'm struggling with is, What is the indicia --
17 well, how do I know that on February 27th it's no longer a
18 business discussion? It's a settlement negotiation? What
19 is it that indicates that?

20 MS. GODESKY: I think it's the combination of the
21 Rule 408 stamps on the back and forth. And, Your Honor,
22 there's no response from FICO saying, Wait a minute, I'm not
23 treating this as a privileged communication.

24 And I can tell you I've had that situation before.
25 Right? I've sent lawyer -- I've sent emails to adversaries

1 with a 408 stamp. And I might get a response back saying,
2 To be clear, we don't view this as a privileged settlement
3 discussion, We still view this conversation as having a
4 business purpose. Right? Lawyers make that type of
5 confirmation all the time. That was never made here. No
6 one ever wrote a letter and said, To be clear, Chubb, we're
7 still in business discussions, This isn't litigation.
8 Right? Chubb was screaming from the rooftop Rule 408
9 privilege. So there's that.

10 I'm sure that I have seen in the deposition
11 transcripts in this case numerous instances of FICO's
12 lawyers bringing up the Rule 408 privilege over these very
13 communications. I do not have that at my fingerprints. I'm
14 sure if we were to look at the privilege log, there were
15 probably also logged communications with lawyers around this
16 time period about settlement, but to me -- and all that the
17 court needs to rule on this motion right now is we've got
18 Rule 408 assertions by Chubb that are uncontested by FICO
19 during the time period in question.

20 THE COURT: So let me ask you two other questions.
21 Prior to February 26th of 2016, did the parties exchange
22 numbers and are those numbers in documents that are going to
23 be proffered at trial?

24 MS. GODESKY: No.

25 THE COURT: Okay. So what was the nature of

1 the -- if you are not exchanging numbers prior to
2 February 26th, what are you exchanging?

3 MS. GODESKY: The information from FICO to Federal
4 was, Here's how we, you know, Here are our breach
5 allegations, You have breached the contract, and we're
6 laying out our assertions against you. And then what you
7 see, there's some letters from Chubb saying, We're looking
8 into your allegations, but right now our technology systems,
9 they're running exactly as they were right before the
10 acquisition.

11 And then the business proposal that Ms. Pawloski
12 laid out on February 25th said, Here's what we're willing to
13 do from a business perspective; Even though we bought an
14 enterprise-wide perpetual license to use Blaze, so that
15 everyone can, can move forward, we, Chubb, would be willing
16 to cabin our use of Blaze going forward to a certain number
17 of named applications, because it seems like there's all
18 these concerns about expanded use and how everything is
19 going to change after the ACE acquisition, so here's what
20 we'd agree to, we'll use it in this way moving forward. And
21 she lays it out in a chart in a letter. And so that was the
22 business proposal that was then declined in that note from
23 Mr. Carretta.

24 THE COURT: Okay. One last question for you, and
25 you need to be complete and precise. What is FICO's -- or

1 Federal's counterclaim in terms of the breach of the implied
2 covenant of good faith and fair dealing?

3 MS. GODESKY: Our counterclaim is that -- there's
4 two aspects of it. The first aspect is that FICO
5 terminated, rushed to terminate or withheld its consent to
6 continued use of Blaze after the acquisition and despite the
7 fact that it had no evidence of expanded use at Chubb, in
8 terms of the Blaze software.

9 The other aspect relates to the fact that, as
10 Ms. Janus suggested earlier in the context of the other
11 motion, in this initial period, in those initial breach
12 letters that Chubb received from FICO, FICO argued that it
13 had just discovered use of Blaze outside the United States,
14 in Europe, Canada, Australia. And we believe, because the
15 discovery in this case has demonstrated, that that was an
16 allegation made in bad faith, because FICO had known for a
17 decade before this dispute arose that Blaze was being used
18 globally.

19 THE COURT: Okay. All right. Thank you for that.

20 I'm going to take a couple of minutes.

21 MR. HINDERAKER: Your Honor.

22 THE COURT: Yes, sir. Go ahead, Mr. Hinderaker.

23 MR. HINDERAKER: Do I have some minutes left?

24 Because I think there are factual misstatements that I would
25 like to address.

1 THE COURT: Go ahead.

2 MR. HINDERAKER: The redlined, there are redlined
3 versions of an amendment to the license agreement. One
4 example is P0852. Ms. Godesky called that a settlement
5 agreement. It is Amendment Three to the license agreement
6 of March 25, 2016, directly a chart of the parties' efforts
7 to amend the, you know, to find the path toward consent. I
8 believe it's accurate.

9 I checked that the only communications that had
10 any Rule 408 designation were rather boilerplate, and they
11 came from the Chubb and some people, Tamra. And it's not
12 surprising to me that the communications between business
13 people don't highlight that little boilerplate at the end
14 of -- at the end of the email.

15 In answer to your question regarding the
16 chronology, Your Honor, the beginning is at the end of
17 January of Carretta. He is responded to by a gentleman by
18 the name of Hopp around February 17. So Carretta has just
19 sent notice of breach. Mr. Hopp then concludes his letter
20 saying, "We value the long-term relationship. I fully agree
21 with you that we should have the business people make their
22 efforts robust to resolve this dispute." That's about
23 February 17th.

24 On February 25 is when Tamra Pawloski sends a
25 commercial proposal. That apparently is not part of the

1 settlement negotiations, but it certainly is part of the
2 business negotiations. And she sets out Chubb's position,
3 including saying that they would use Blaze Advisor on 15
4 applications.

5 The communications then follow and include -- now
6 we're into March. And the communications include
7 discussions with Tamra and the business people like, for
8 example, Bill Waid. And on March 2nd FICO says, "FICO
9 shares your desire to address this issue through business
10 negotiations" and offers alternatives and options. There
11 are communications by phone between business people of FICO
12 and business people of Chubb to where FICO discloses or
13 describes its pricing methodology, the way in which it is
14 setting out these prices.

15 Sawyer sends on March 17th, Please see columns K
16 through Q for today's discussion about -- one of the
17 communications that -- at the end of March is FICO pricing a
18 new license relationship based upon 15 applications, as was
19 per the February 25 commercial proposal.

20 The communications through the end of March were
21 triggered by -- were triggered and followed up from that
22 commercial proposal, included discussions with FICO how do
23 you do your pricing, included Chubb coming back and saying I
24 think that a better form of pricing would be something else.
25 Tamra's email of March 25 with Chubb's counter-proposal to

1 FICO's proposal goes through a pricing methodology that
2 conforms with the logic that the parties had been talking
3 about throughout the month, starting with what's the total
4 premium for the entity, you know, for Chubb.

5 So there is no distinction between some point
6 where it turns into negotiations over the settlement of some
7 dispute. It comes to a place where, where what Chubb was
8 willing to do for FICO's consent and what FICO was willing
9 to do for FICO's consent differed, but that's the end of,
10 that's the end of a negotiation.

11 So I just wanted to have that, the rest of the
12 story there. It's there for Your Honor to see when you look
13 at the documents and you look at the documents themselves.

14 The answer to the question about the
15 counterclaim -- the first answer is what the counterclaims
16 have been since the second amended -- since the answer to
17 the second amended complaint. And the second basis for the
18 counterclaim is, is the territorial limitation dressed up
19 into different guises, whether it's a client or whether it's
20 you were negotiating against us because of that.

21 And when you go back to the lawyer communications,
22 which are not part of this set of documents, Carretta says,
23 We found these -- we discovered these installations outside
24 the United States, if that's -- let's keep the business
25 people talking.

1 I really think, Your Honor, that the jury is
2 entitled to see the full picture, and none of this is going
3 to bear on the policies behind Rule 408.

4 So thank you for hearing me out.

5 MS. GODESKY: Your Honor, this is, this is Leah
6 Godesky. I'm so sorry. If I may just make one point that I
7 did not make earlier?

8 THE COURT: Very briefly.

9 MS. GODESKY: There was just a concern raised by
10 Mr. Hinderaker that we might be referencing the demands from
11 FICO during this settlement negotiation period. Right? The
12 fact that at one point they, they made a demand for over
13 \$3 million to resolve the dispute. And I just wanted to
14 make clear that we're drawing this bright line at
15 February 27th. And, of course, our position is, you know,
16 nothing after that date would come in. So we're not going
17 to seek to use their demands offensively.

18 THE COURT: Yeah, that -- it strikes -- I
19 understand your point. It's just a comment. It strikes me
20 that if you -- if that were to come into evidence, you would
21 want to -- you would be tempted to say to the jury, See,
22 this case is worth 3 million, which is exactly what you
23 cannot do under Rule 408.

24 Here's what we're going to do. I'm going to take
25 a break to think about this a little bit further for about

1 five minutes.

2 You all need to stay on the line, but mute your
3 microphones and, yeah, mute your microphones, otherwise
4 you're going to be talking to each other without knowing it
5 or talking to me without knowing it, and nobody wants to do
6 that.

7 Renee, if you could answer this. Do you have ten
8 more minutes?

9 COURT REPORTER: Yes, I do, Your Honor.

10 THE COURT: Okay. All right. I'm going to take a
11 break. I'll be back with you all. Hang on.

12 (Recess taken at 5:58 p.m. till 6:06 p.m.)

13 THE COURT: All right. So here's what I am going
14 to do, starting first with the issue of the testimony of
15 Schreiber and Wachs.

16 I am not going to prohibit -- well, first of all,
17 we're here I think primarily about opening statements, but
18 that testimony and FICO's knowledge of the use by Federal
19 affiliates outside the United States is relevant and
20 admissible to show both the definition -- may use it to
21 argue what "client and affiliates" means. It is also
22 relevant and admissible to the good faith and fair dealing,
23 implied covenant argument. And I'm going to provide the
24 parties -- so no restriction on that testimony for the
25 opening statements.

1 I'm going to try and make it really clear what I
2 believe I said on the motions in limine on this topic.

3 Federal is free to argue that FICO breached the
4 implied covenant by improperly or outlandishly or raising
5 positions that were in bad faith. Okay? And when that gets
6 to the issue of territorial restriction in the license, we
7 have to be very clear and very careful. Federal can say
8 through appropriate witnesses and documents that FICO took
9 this position as part of its breach and that Federal viewed
10 that as in bad faith and here is why.

11 What Federal cannot do, and I want to be extremely
12 clear, you will not use the court to prove that argument in
13 any way, shape or form. So we're not referencing court
14 orders. We're not arguing in final argument that, And, you
15 know, the court has found that there is no territorial
16 restriction. We're not doing that.

17 I will, as necessary, craft something if I have to
18 that explains the absence of a territorial restriction, but
19 I don't think that's going to be necessary, because I can't
20 imagine that FICO is going to argue that there is in fact a
21 territorial restriction in the license agreement, but
22 Federal -- or FICO is very well within its right to argue
23 that, yes, it asserted that position and it believes that
24 that position was properly taken, but hopefully that gives
25 everybody a little further guidance.

1 Turning to the issues regarding what Federal says
2 are settlement documents, what FICO says are business
3 documents. First and foremost, I am sure that at some point
4 along the spectrum of the discussions between the parties
5 that the tenor of that communication changed from "How do we
6 keep a business relationship going" to "How do we avoid
7 litigation." It is not clear to me where that line is or
8 where that tenor changed, necessarily.

9 What I am going to order for purposes of the
10 opening statements, in an effort to be careful and fair to
11 all parties, the parties can talk about the period of
12 negotiation following the notice of breach, and you can use
13 in your opening statement documents up to the date of
14 February 26th for the opening statements.

15 I want the parties to submit to me a list of all
16 documents after February 26 and prior to the litigation that
17 encompass any dialogue between the parties that one side
18 will characterize as "settlement negotiations" and the other
19 won't. You submit those lists to me. And I want more
20 comprehensive briefing on this topic of where it crosses the
21 line and when it violates Rule 408.

22 I will tell you I'm very concerned about allowing
23 in evidence where the parties are tossing numbers back and
24 forth, whether or not those are settlement negotiations.
25 I'm very concerned about opening a can of worms there. I'm

1 frankly -- well, Federal could certainly use some of those
2 numbers to its advantage in this litigation, and I think
3 that would be exactly beyond a violation of Rule 408. FICO
4 could certainly use some of those numbers to its advantage
5 as well.

6 But for purposes of opening statements, you can
7 talk about the period in which the parties had business
8 negotiations, you can describe them generally without
9 identifying dollar numbers, and you can use documents up to
10 and including February 26. I'm reserving for a later
11 date -- as soon as you can get me the lists and the
12 briefing, I will decide about documents from the period of
13 February 26 forward.

14 All right. Let me just first ask Mr. Hinderaker,
15 no argument, but any questions or clarification needed?

16 MR. HINDERAKER: I think I understand it, Your
17 Honor.

18 THE COURT: Okay. Thank you.

19 Ms. Godesky, questions or clarifications?

20 MS. GODESKY: No thank you, Your Honor.

21 THE COURT: Two last things. When you brief this
22 issue -- and, you know, Mr. Hinderaker, I don't know how
23 soon you will be wanting to put this evidence in. So if you
24 know it's, you know, something you want your first witness
25 to do, better get me the briefs on, you know, tomorrow

1 night.

2 And, Ms. Godesky, you have to at least communicate
3 with plaintiffs to understand how quickly this deadline
4 approaches so that we can get all the briefs in.

5 I would appreciate it if the parties would also
6 address in that briefing whether any of these documents can
7 be given with a limiting instruction.

8 Last comment or last direction or guidance for the
9 parties. I've been looking at your exhibit lists and
10 objections. I want to make one thing really clear. I think
11 it's clear. I understand FICO objects to documents coming
12 in without a sponsoring witness. Understood. No document
13 is being admitted except through a witness, and the witness
14 is going to have to be somebody who has knowledge or
15 foundation for the document.

16 My repeated suggestion to folks is, When there are
17 documents that you know if the right witness is there it's
18 clearly coming in, don't object to it, because then we can
19 save some time in trial. We don't have to have somebody
20 saying, Mr. So and so, do you recognize Exhibit 12; yes, I
21 do; what is it; it is; did you receive it. You don't have
22 to do all that if you know the document is coming in, but
23 I'm also depending on the lawyers to only use documents with
24 an appropriate witness.

25 And the last thing on that, as I said before, no

1 document is going to the jury that isn't used with a witness
2 during the trial. Okay?

3 So with that, last call. Mr. Hinderaker, anything
4 further we need to address right now?

5 MR. HINDERAKER: No, Your Honor.

6 THE COURT: Okay. Anything further, Ms. Godesky?

7 MS. GODESKY: No thank you.

8 THE COURT: All right. I should tell you this
9 last thing. During the course of the trial, including
10 tonight since we start tomorrow, if something arises that
11 you need -- that you know you are going to want to take up
12 with me before court, if you will email it directly to my
13 email address and also copy my law clerk on it by 10:00 at
14 night, the night before, we'll for sure be able to be
15 prepared to address it in the morning. Okay?

16 MS. GODESKY: Thank you, Your Honor.

17 MR. HINDERAKER: Thank you.

18 THE COURT: Okay. Everybody, have a good night.
19 Get some sleep, if you can, and we'll see you in the
20 morning. We're in recess.

21 (Court adjourned at 6:17 p.m., 02-14-2023.)

22 * * *

23 I, Renee A. Rogge, certify that the foregoing is a
24 correct transcript from the record of proceedings in the
above-entitled matter.

25 Certified by: /s/Renee A. Rogge
Renee A. Rogge, RMR-CRR